

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

SYLVIA LEEDS,)	
)	
Plaintiff,)	
)	
v.)	Case No. 6:09cv61
)	
JOHN DOE TWO,)	
THE KROGER CO., and)	
PENDUM, LLC,)	
Defendants.)	
)	
)	

**DEFENDANT THE KROGER CO.'S OPPOSITION TO PLAINTIFF'S MOTION
TO DISMISS DEFENDANT PENDUM, LLC AND MOTION FOR LEAVE TO
FILE A CROSSCLAIM, OR IN THE ALTERNATIVE A THIRD PARTY
COMPLAINT**

The defendant, The Kroger Co. ("Kroger"), by counsel, files this opposition to plaintiff Sylvia Leeds' ("plaintiff" or "Mrs. Leeds") motion to dismiss defendant Pendum, LLC ("Pendum") as a party defendant, and in the alternative moves this Court for leave to file a crossclaim against Pendum, LLC, and in support of this Motion respectfully represents as follows:

1. Plaintiff's original Complaint alleged joint and several liability of defendants Kroger, John Doe One¹ (Kroger Employee), Pendum, and John Doe Two (Pendum Employee).
2. Plaintiff alleged that Kroger negligently placed a boxed patio umbrella in such a manner as to injure plaintiff, and that Pendum's employee (John Doe Two) negligently struck a magazine rack, thereby dislodging the box which struck the plaintiff.

¹ John Doe One was dismissed by Order of this Court dated March 3, 2010.

3. Plaintiff took the deposition of the Pendum employee, Calvin Whitt, on April 20, 2010.²

4. Mr. Whitt does not recall bumping into the magazine rack. Nonetheless, based on Mr. Whitt's description of the location and position of the box, a jury could reasonably conclude that the box could not have become dislodged absent someone bumping the magazine rack. All witness' testimony establishing that Mr. Whitt was the only person in a position to have bumped the rack, regardless of whether he recalls doing so.

5. The deposition of Mr. Whitt establishes that Pendum may be liable for all or part of the plaintiff's claim asserted against Kroger.

6. While Pendum was a party defendant, there was no need for Kroger to assert a crossclaim against Pendum.

7. Dismissing Pendum from this action altogether would leave as Kroger's only recourse a separate action for indemnity, should plaintiff prevail against Kroger.

8. Judicial economy favors the resolution of all questions of liability arising from a single occurrence to be presented in the same proceeding.

9. Kroger would be prejudiced by the dismissal of Pendum because it can only take advantage of Virginia Code § 8.01-35.1 if Pendum is determined to be a joint tortfeasor.

WHEREFORE, your defendant The Kroger Co., by counsel, respectfully requests this honorable Court deny plaintiff's motion to dismiss Pendum, LLC as a party defendant and allow Kroger leave to assert a crossclaim against Pendum, LLC, or in the alternative, grant Kroger leave to file a third party complaint against Pendum, LLC.

² Mr. Whitt is "John Doe Two."

THE KROGER CO.

By: /s/: C. Kailani Memmer
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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